

**Incompetent Resistance?**  
**Core Aspects of Civilian**  
**Direct Participation In Hostilities**

Candidate number: 616

Supervisor: Sigrid Redse Johansen

Deadline for submission: (04/25/2009):

Number of words: 15,757 (max. 18.000)

23.04.2009

# Content

<b><u>1</u></b>	<b><u>INTRODUCTION</u></b>	<b><u>1</u></b>
1.1	Presenting International Humanitarian Law and the concept of direct participation in hostilities	1
1.2	Specifics pertaining to this paper	2
1.3	Methodology and sources	3
<b><u>2</u></b>	<b><u>THE PRINCIPLE OF DISTINCTION</u></b>	<b><u>5</u></b>
2.1	Civilians and combatants	6
2.2	DPH analysis and combatancy status in NIACs	7
2.3	Threats to the principle of distinction	9
2.3.1	Facets of modern armed conflict	9
2.3.2	Intermediate categories and expansion of the term "combatant"	10
<b><u>3</u></b>	<b><u>DEFINING THE TERM "HOSTILITIES"</u></b>	<b><u>12</u></b>
3.1	Delimitation of NIACs pertaining to internal disturbances and riots	13
3.2	Armed conflict, hostilities and attacks	13
3.3	Models of the notion of "hostilities"	15
3.3.1	Acts adversely affecting the enemy	16
3.3.2	Acts directed against the enemy	16
3.3.3	Zone of hostilities	17
3.4	Resulting concept of "hostilities" for the purpose of DPH analysis	17
<b><u>4</u></b>	<b><u>DIRECT PARTICIPATION</u></b>	<b><u>18</u></b>
4.1	Initial remarks	18
4.2	Systematic approaches to direct participation	20
4.2.1	Restrictive approach	20
4.2.2	Functional combatancy and membership models	21
4.2.3	Extensive textual interpretation of <i>direct</i>	23
4.3	Emerging criteria for constituting DPH	24
4.3.1	Threshold of harm	24
4.3.2	Direct causation of harm	25
4.3.3	Belligerent Nexus	26
4.4	Clarifying direct participation facilitated by sub-division of civilians	27
4.5	Resulting concept of direct vs. indirect participation	29
<b><u>5</u></b>	<b><u>TEMPORAL SCOPE OF DIRECT PARTICIPATION IN HOSTILITIES</u></b>	<b><u>32</u></b>
5.1	The problem of the "revolving door"	32
5.2	Varying approaches to the temporal scope of DPH	34
5.2.1	Specific acts	35
5.2.2	Affirmative disengagement	36
5.2.3	Membership model	37
5.3	Clarifying "for such time"	38
<b><u>6</u></b>	<b><u>PRECAUTIONS IN CASES OF DOUBT</u></b>	<b><u>40</u></b>
6.1	Restrictive view	41
6.2	Liberal view	42
6.3	Resulting treatment of doubt in determining direct participation in hostilities	43
<b><u>7</u></b>	<b><u>CONCLUSIONS</u></b>	<b><u>43</u></b>
	<b><u>REFERENCES</u></b>	<b><u>44</u></b>

# 1 Introduction

## 1.1 Presenting International Humanitarian Law and the concept of direct participation in hostilities

International Humanitarian Law, or IHL, often referred to demotically as *the laws of war*, is an international legal entity regulating armed conflict, mainly between states due to its historic origins, but also armed conflict of a non-international essence, or *civil war*. It regulates the conduct of belligerents and their responsibilities toward each other and notably the civilian population, *ius in bello*, and also to some extent *ius ad bellum*.

IHL is based on international treaties, and the main bodies of legal sources are the Hague Convention, the four Geneva Conventions and the two Protocol Additions to the Geneva Conventions. There is also a notable customary law of armed conflict.

IHL distinguishes between two different stati in armed conflict, combatants and civilians. The distinction is essentially between those who have the right to perform acts of war in armed conflict, and those who have no such right.

Protection of the civilian population is one of the main purposes of IHL, and the law dictates that no civilian can be a legitimate military target in armed conflict, unlike persons with combatant status. However, IHL does stipulate that civilians may be legitimate targets if they participate directly in hostilities, and then for the duration of this participation. The relevant provision in Additional Protocol I is: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities". This entails a suspension of the protection afforded civilians under IHL. Accordingly, defining what *constitutes* such direct participation in hostilities is of paramount importance, firstly to protect innocent civilians from being wrongly targeted, and secondly to facilitate combatants' possibility to adhere to IHL and engender respect for the laws of armed conflict.

## 1.2 Specifics pertaining to this paper

Direct participation in hostilities (acronym DPH, both designations used interchangeably hereafter) is a much debated subject. The International Committee of the Red Cross (ICRC), as well as numerous authors, have contemplated and discussed the subject extensively.

The subject of this paper is the core of the DPH rule: what constitutes civilian direct participation in hostilities under IHL. The main questions are:

- What is *hostilities* in this context
- What makes participation in such hostilities *direct*
- How should the *temporal aspect* of this be treated, regarding suspension of protection
- How are the ideas behind IHL itself best protected regarding DPH

The discussion will first address briefly the principle of distinction between civilians and combatants in IHL in relevance to DPH, before concentrating on the main issues of debate in DPH analysis: "hostilities", direct vs. indirect participation, and the temporal aspect of DPH. Precautions in situations of doubt will also be addressed briefly.

The subject will be treated with the base idea that theoretical rationality must at all times be weighed against practical applicability. A solution that best suits the idea behind and purpose of IHL *in practice* will be the best solution. Such a practical approach is also of paramount value because the legal framework of armed combat must be suited to the needs and practices of both armed forces *and* civilians inhabiting areas of armed conflict, lest the general respect for and effectiveness of the law be rendered nugatory.

A distinction between international armed conflict (IAC, the terms used interchangeably hereafter) and non-international armed conflict (NIAC) is made by IHL treaty law.

Whether DPH is discussed within the context of an IAC or a NIAC, the main considerations behind the analysis will remain substantially the same. Specific elements

pertaining particularly to either will be pointed out if constituent parts of the analysis requires divergent treatment.

"Classification" of civilians into categories that determine how they be regarded in a DPH-situation will also be discussed. Neither human shielding, the problem of civilian contractors performing various tasks in a situation of armed conflict, nor so-called "targeted killings" will be treated, all being outside the scope of this paper.

### 1.3 Methodology and sources

For the purposes of this paper, the common methodology of international law will be employed in accordance with the statutes of the International Court of Justice (ICJ) art. 38. Accordingly, the treaties of main relevance to this paper will be the four Geneva Conventions of August 12. 1949 (GC), with its two additional protocols of June 8. 1977 (AP I and AP II). The provisions specifically regulating civilian direct participation in hostilities are of principal relevance: art. 51 (3) AP I, art. 13 (3) AP II and Common Article 3 (CA 3) to the Geneva Conventions.

The International Committee of the Red Cross (ICRC) commentaries to the GCs and AP I and II have been frequently consulted.

There is also a notable customary law of armed conflict, extensively commented upon and treated in an ICRC study; it is an extensive endeavour to clarify such customary law and thus pertinent to this paper with its treatment of DPH. It is worth noting that, whilst the treaties mentioned only binds states that have ratified them, customary IHL is regarded as being applicable to all instances of armed conflict and consequently binds all actors in such conflict.

Regarding court rulings, the Supreme Court of Israel's judgement pertaining to the Israeli Government's policy of targeted killings (hereafter dubbed PCATI v. Israel) is of particular appositiveness, discussing DPH extensively.

Of particular interest is also the three ICRC meetings specifically deliberating the issue of DPH (hereafter dubbed first, second and third ICRC meeting), from which the ICRC have released summary reports. They took place from 2003-2005, with numerous experts on the field participating, consequently providing an insight into the main aspects of today's DPH debate. One should, however, bear in mind that the summary reports are essentially summarising *discussions*, and their value as legal sources should stand relative to that fact.

Literature on the issue of DPH is otherwise rather scarce, mainly consisting of individual articles from various publications. These will be employed where they are relevant.

Fleck's comprehensive handbook on IHL is useful in providing overview of the subject of DPH and IHL, and has been much used for general reference.

## **2 The Principle of distinction**

The principle of distinction is one of the fundamental principles of international humanitarian law. In armed conflict, the lawfulness of deprivation of life depends on whether the targeted person is a legitimate military objective or not. This notion was expressed in the St. Petersburg Declaration of 1868 - "*(...) the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy*". Demonstrably, the age old idea that only military objectives of applicational value to the adversary may be attacked, while those not of such value be left alone, is axiomatically expressed in this sentence. The most clear expression of the principle is found in art. 48, AP I, with an articulate wording regarding the obligation to distinguish between civilian and combatant: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and civilian objects and military objectives and accordingly shall direct their operations only against military

objectives”.

Thus, the principle of distinction does not permit attacks on the peaceful civilian population and civilian objects of no military value, only against the armed forces of the adversary and other military objectives.

In addition to being long established customary law in both international and non-international armed conflict, the principle of distinction is codified in a number of provisions of both the Hague Regulations, and AP I and AP II. Article 27 of the Hague Regulations states that civilian objects of a typically cultural value are not to be attacked (unless they are used for military purposes), and Article 25 provides a general prohibition of attack or bombardment of locations of a civilian nature.

Whilst defining the terms “civilians” and “civilian population” in art. 50, AP I further elaborates in art. 51, setting out specific rules regarding the protection of the civilian population against military operations in armed conflict, and art. 52 on general protection of civilian objects.

Any discussion of civilian direct participation in hostilities necessitates a clarification of the terms *combatant* and *civilian*; it is exactly the blurring of the line between these that poses a significant challenge in contemporary armed conflict.

## 2.1 Civilians and combatants

The principle of distinction is fundamental to any discussion of civilian participation in hostilities. The core in this regard is the clear and steadfast line between civilians and combatants. Article 43 (2) AP I provides a definition of “combatant”: *“Members of the armed forces of a Party to the conflict [...] are combatants, that is to say, they have a right to participate directly in hostilities”*. Conversely, a civilian (and members of the armed forces without combat privilege) does not have the privilege of combatancy and may be held accountable for participation in hostilities.

The principle consequently entails that only combatants with combatant status have the

right to participate in hostilities, whereas civilians have no such right. In armed conflict, this means that combatants have a *de facto* licence, albeit with the limitations posed by IHL, to kill without being subject to penal sanctions under relevant domestic criminal law. This is not the case for a civilian. However, a civilian cannot be targeted in armed conflict - they are afforded protection *in leges*, with one caveat: if they participate directly in hostilities even though they have no such right, they will suffer a suspension of this protection for the duration of their participation.

That a civilian does not have the *right* to participate directly in hostilities does not mean that such participation is *prohibited* under IHL; the consequences of such participation is not necessarily liability for war crimes, but it exposes the person in question to possible penal sanctions according to domestic law, since the acts may be considered crimes under such law.

A number of the main challenges posed by modern warfare is brought to the forefront by both the NIAC becoming more prominent on a global scale, and the internationalisation of such conflict by alien states' entry. Although this is, as shall be seen, problematic in that it creates confusion regarding status and the nature of actors' participation, the principle of distinction – the obligation imposed on all participants in armed conflict to distinguish between combatant and civilian is something IHL dictates adherence to in all armed conflict.

## 2.2 DPH analysis and combatancy status in NIACs

While the formal status of combatancy is recognized in international armed conflict, its position in non-international armed conflict deserves special attention. At the diplomatic conference leading up to the two additional protocols to the Geneva Conventions, there was fervent disagreement regarding how combatancy should be treated in AP II, pertaining to NIACs. For political reasons, the end result was that AP II does not recognize combatant status *per se*, as this was deemed by many states as a recognition of rebel groups' legitimacy, a hard thing to concede for states viewing such groups as mere criminals under various domestic laws.



Thus, the legal definition of "combatant" found in AP I does not apply to non-international armed conflict. Combatancy in international armed conflict relates to combatant *privilege* and the right to prisoner-of-war status in case of capture by the adversary, whereas in a NIAC the term is by some used descriptively, denoting persons *not enjoying civilian protection from attack*. While AP I, applicable in IACs, states that the parties to the conflict shall distinguish between civilians and combatants, AP II, pertaining to NIACs, simply state that civilians shall not be the object of attack. The draught version of AP II, art. 24 (1) employed similar wording as the rule in AP I , but it was eventually omitted by vote. Notwithstanding the distinction between AP I and AP II on this point, the fact that AP I clearly stipulates that a principle of distinction is to be adhered to does not mean that such a principle is lacking in armed conflicts not of an international character.

The distinction between DPH in international and non-international armed conflict is arguably not of the greatest *practical* interest, as the same evaluations pertain to DPH in both types of conflict. The main problem specific to NIACs with determining DPH lies not so much in what constitutes *direct participation* as in what constitutes *hostilities* for the purpose of DPH analysis. Mere internal disturbances and riots do not qualify as armed conflict and consequently lie outside the realm of IHL, and the line between such upheavals and armed conflict can indeed be hard to draw. Still, this is a question of what falls outside the scope of a DPH analysis, not a relevant issue in the analysis proper.

The issue of combatancy being of some complexity in NIACs, what is most relevant for the purposes of this analysis is bearing in mind that non-State actors participating in hostilities in NIACs are civilians by status, and applying the term "functional combatants" or "fighters" to them does in no way imply legal combatant status.

### 2.3 Threats to the principle of distinction

In order to ensure the protection of civilians in armed conflict, upholding the principle of distinction is vital; accordingly, elements disarraying the perspicuity of the line between

civilian and combatant must be clarified lest the law of armed conflict become weakened through lack of coherence. This blurring of the line between *stati* is highly relevant to any discussion of civilian DPH, and if a clear distinction is getting increasingly difficult to uphold, this could undermine the protection afforded civilians in armed conflict; if combatants find themselves uncertain whence they may be attacked and by whom – coupled to the precariousness of whom they may in turn attack legally – the application of IHL in armed conflict will hardly propagate. A steadfast perception of who may be attacked and who is protected in armed conflict, and, hereunder, how civilian direct participation in hostilities is defined, is made increasingly difficult by a number of contemporary phenomena.

### 2.3.1 Facets of modern armed conflict

The four Geneva Conventions came into being after the two World Wars had dominated the first half of the 20th century; this genus of armed conflict, in which wars are fought by sovereign states consisting of government, army and people, seems out of pace with what armed conflict looks like today. Contemporary conflicts often involve opposing armed groups and other non-state actors *as well* as state military forces. Moreover, the goal of some parties in contemporary conflict may very well not be final peace and stability, but a continuation of the turmoil for reasons specifically advantageous to that party or, in the case of many civil wars/internal conflicts, a goal seemingly indispensable to one party and intolerable to the other.

The linearity of modern armed conflict is increasingly being perturbed, rendering distinction between legitimate military targets and protected elements often notoriously difficult. Specifically, the decline of the "forward edge of the battle area", or FEBA, and urbanisation of the battlescene greatly confuses such distinction. Additionally, shifting the battle closer to the civilian population may increase the risk of civilian participation, if for no other reason than greater incentive to do so brought forth by the proximity to the conflict. Thus, proximity to the FEBA is no longer so clear an indicator of DPH since the conflict has come to the civilian, and not the opposite.

Another facet of modern armed conflict is technological asymmetry, with one party vastly

superior technologically to the other. This involves the possibility of attacking and conducting military operations far from the battle area for one party, while the other has to apply far more rudimentary tactics. In such conflict, the distinction between legitimate military targets and protected persons can be difficult to assess, and requires further inspection as to what actually constitutes civilian DPH.

### 2.3.2 Intermediate categories and expansion of the term "combatant"

In dealing with the threat of various armed – and more or less organized – groups, one has seen a developing practice of operating with a "third category" in-between civilian and combatant status; this category encompasses so-called "unlawful combatants", denoting persons without combat privilege who have taken part in hostilities unlawfully. This is problematic in that it transgresses the fundamental line between civilian and combatant. A combatant, if captured by the adversary, has the right to POW status, endowing him with numerous rights, all of which are inexorable. A civilian, on the other hand, has no right to POW status, but enjoys a different set of rights, amongst others the right to fair hearing in the case of possible penal offences, and protection against unlawful internment. Applicable in IACs, AP I states that detained civilians (not to be charged with penal offences) shall generally be released "with the minimum delay possible". In the case of NIACs, both AP II and CA 3 lack specific provisions regulating such detention, but the Human Rights privilege of *habeas corpus* entails that a civilian will have the right to have a court of law determine the lawfulness of his detention. Consequently, he cannot be held *indefinitely* on instances of mere suspicion of penal offences, for instance. In light of this, the introduction of a "third category" has created a class of persons lingering in a void with the detriments of both categories and the rights of none, perhaps reducing their protection below the minimum standard of human rights. One has noted the term "unlawful combatants" more often than not applied to such persons. It cannot be underlined enough that the term "unlawful combatancy" has no place in IHL; since participating in hostilities *per se* is not prohibited by IHL – IHL merely states that suspension of protection from attack is a consequence of DPH – the term has no relevance outside the realm of domestic penal law. Another variation of the term, "unprivileged belligerents" seems more appropriate for IHL application, since it relates to the fact that civilians do not have combatancy privilege.

Employing a third category of “unlawful combatants” as a legal status in IHL, alongside that of *civilian* and *combatant*, is under no circumstances legally acceptable. The same stance was taken *de lege lata* by the Israeli Supreme Court in *PCATI v. Israel*, and Melzer argues that such a category has no place in IHL, regarding it as belonging to the realm of domestic law and employing the term “functional combatancy” for members of organized armed groups participating in hostilities. The “functional combatancy” model is seen as not contrary to IHL because its proponents argue that it is a consequence of DPH, and not an ad hoc, *de lege ferenda* classification.

The existence of organized armed groups not belonging to a state and operating on their own accord in armed conflict is a quite present facet of modern armed conflict. The distinct faculties of what constitutes an army may also apply to such organisations, and defining how their members should be treated by the laws of armed conflict is becoming a pressing matter. Indeed, members of such organisations are civilians in the legal sense of the term, but treating them, in some cases, as combatants in practice seems increasingly rational in the climate of today’s armed conflicts. However, such treatment should not confuse the fact that although the law may *treat* such persons as combatants as a function of DPH, they are still civilians under IHL.

### **3 Defining the term “hostilities”**

For direct participation to entail suspension of protection from attack, it has to pertain to “hostilities”; the term is used uniformly in art. 51 (3) AP I, art. 13 (3) AP II and CA 3 (2). Direct participation in activities that does not constitute hostilities in the sense of these provisions will consequently fall outside the scope of DPH analysis.

#### **3.1 Delimitation of NIACs pertaining to internal disturbances and riots**

It is clear that “hostilities” can only be conducted in the context of armed conflict for

purposes of a DPH analysis. The threshold of application for CA 3 is armed conflict in State territory: "[...] armed conflict not of an international character occurring in the territory of one of the High Contracting Parties [...]". AP II sets the threshold higher in its art. 1 (1): " [...] all armed conflict [not of an international character] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Moreover, art. 1 (2) AP II specifies that it shall not apply to internal disturbances and riots. Notwithstanding AP II's high threshold of application, a qualification of "hostilities" in the DPH sense of the term can also be based on CA 3. It is clear, however, that the "armed conflict" of *both* CA 3 and AP II excludes internal disturbances, riots and sporadic acts of violence, and such situations can consequently never amount to "hostilities".

### 3.2 Armed conflict, hostilities and attacks

It is necessary to point out that *hostilities* is not equivalent to the concept of *armed conflict*, the former being narrower in scope than the latter. It has been pointed out, for instance, that a situation of "armed conflict" can very well come into being and, indeed, be carried out without ever incurring any "hostilities", e.g. through a mere declaration of war or occupation of enemy territory without armed resistance, and a great deal of the law of armed conflict pertain to issues other than the conduct of hostilities. Common Article 2 to the GCs states that: " [...] the present Convention shall apply to all cases of declared war [...]" and "The Convention shall also apply to all cases of partial or total occupation [...] even if the said occupation meets with no armed resistance." The ICRC describes the dichotomy as "It [the rules of the conduct of hostilities] essentially covers the conduct of military operations in armed conflict by defining proper and permissible uses of weapons and military tactics".

The notion of hostilities for DPH purposes should arguably be wider than that of an attack, and narrower than "armed conflict". It has been described as "actual prosecution

of the armed conflict on behalf of the parties to the conflict”.

AP I defines “attacks” as “[..] acts of violence against the enemy, whether in offence or defence”, providing a rather wide definition. The commentary elaborates, stating that the term has a wider denotation in the sense of IHL than it has in regular usage; the widening incorporates extending the term to cover defensive as well as offensive acts, and, moreover, acts such as the placing of mines and sabotage should be included as well. The commentary summarises these elements as “attacks” denoting “combat actions”. This definition of the term will be applicable in the “hostilities” of the DPH rule.

“Attacks” will also incorporate the time a participant conducts actions preparatory to participation. This notion is probably based on the temporal scope of a combatant’s obligation to distinguish himself from the civilian population, incorporating both while he is engaged in attack and military operations preparatory to such an attack. A civilian will consequently be participating in *hostilities* not only at the exact time of firing a weapon, but also from the time he takes up the weapon with the intention of participating in hostilities.

It has been suggested that basing qualifications of DPH on such *intention* entails an undesirable complication of the DPH rule. Indeed, one author’s concept of hostilities – “activities which are designed to support on party to the conflict by harming another” – is essentially the definition of so-called *belligerent nexus*, a notion incorporating intent to a high degree.

The material side of “hostilities” in a DPH analysis should ideally be based on the feasible element of physical action and objective criteria rather than subjective elements like *intent* and *design* on the part of the civilian. The most obvious downside to such an approach is that it requires setting the threshold for “hostilities” rather low, or, at least, rather lower than some authors would argue is sensible. However, providing a guideline pertaining to which situations civilians objectively should avoid participating in, do indeed seem more rational than exposing them to evaluations of intent in conjunction with a

geographical element, if the aim of such a guideline is minimizing risk of illegitimate attacks on civilians.

### 3.3 Models of the notion of "hostilities"

"Hostilities" being a composing element of DPH, it seems problematic that conventional IHL does not provide a definition of the term. With terms such as "armed conflict", "attack" and "military operations" often used in a similar sense, the third ICRC expert meeting deemed a clarification useful. The following three ways of interpreting the notion of hostilities for the purposes of DPH analysis were suggested.

#### 3.3.1 Acts adversely affecting the enemy

According to this model, hostilities should be interpreted as to denote "all acts that adversely affect or aim to adversely affect the enemy's pursuance of its military objective or goal". This definition is rooted in the principle of distinction in that it employs the essential aspects of combatancy privilege to delimit the extension of lawful civilian behaviour in such conflict. The interpretation was criticised on the grounds that, while perhaps being useful for regulating which objects may be attacked, for making such a determination regarding persons it is perhaps less suited, since targeting of persons should be "subject to a more restrictive regime than the targeting of objects". Art. 57 (2) lit. a (ii) AP I, addressing precautions in attack, lists "civilian life, injury to civilians and damage to civilian objects" in what seems a hierarchical structure indicating that preserving civilian life requires more precaution in the conduct of military operations than does preserving civilian objects. The same structure can be found in art. 57 (1) AP I, listing civilian objects last. Thus the notion that targeting of persons is subject to a more restrictive regime than the targeting of objects has foundation in treaty wording. In light of this, the interpretation of hostilities offered here may seem too wide, since it does not necessarily distinguish between persons and objects.

### 3.3.2 Acts directed against the enemy

"All military activities directed against the enemy in an armed conflict", is the wording of the second expert proposal. The obvious interpretational difficulties in using the term "military activities" was pointed out by several experts regarding this definition, and indeed the usage of the ambiguous term "military". A proposed solution would be to replace this term with "hostile activities" or merely "activities", resulting in the ambiguous construction "activities directed against the enemy in an armed conflict". The expert proposing the definition clarified that "activities" here would denote acts broader in scope than "combat", but much more narrow than "contribution to the war effort".

### 3.3.3 Zone of hostilities

The third specific proposal for a definition of the term "hostilities" in a DPH sense was based on the concept of simplifying its application by doing away with on-the-run evaluations. The idea was seemingly to combine a narrow interpretation of "hostilities" with a geographical element, thus forming a "zone of hostilities". The thought is clearly to "simplify the operation of the principle of distinction", something the proposal admittedly would entail. However, it effectively does away with the entire concept of this principle in a specified geographical zone, perhaps making it incompatible with IHL itself. At the very least, the legality of such a construction seems dubious, and it may indeed be contrary to the spirit of arts. 51 AP I and 13 AP II pertaining to protection of the civilian population. Moreover, the application of such a zone of hostilities would in practice only be feasible in situations where combat operations are geographically far removed from locations populated by civilians, rendering it useless in a number of today's armed conflicts. Battlefield proximity is already regarded as an element of DPH analysis; so the concept of a zone of hostilities does seem extraneous.

## 3.4 Resulting concept of "hostilities" for the purpose of DPH analysis

Opinions of how "hostilities" should be interpreted as a constitutive element of DPH are many, and the issue is heavily debated. Only a few elements seem to crystallise as possible to assess firmly. Notwithstanding interpretations of "hostilities" such as the ones



discussed above, it seems clear that the term, for the purposes of DPH analysis, should be construed more narrowly than the concept of "armed conflict", and wider than "attacks". In short, hostilities probably should be interpreted to include acts of violence apparently directed against one party to the conflict. Setting up a compulsory requirement of "design", both regarding the intent of harm of the act in question *and* the stipulation that the act should support the other party to the conflict seems implausible for practical application; one could very well require that such may *seem* to be the case and the act should be immediately *construed* like this "on-the-fly" (and then with a rather low threshold), but requiring a full certainty of hostile intent does not seem particularly enlightening as clarification of the term "hostilities" for military personnel engaged in combat operations.

In the context of sporadic and individual participation, a definition of "hostilities" strictly requiring extensive deliberations of subjective intent seems more appropriate for purposes of domestic legal persecution for participation in hostilities than real-time targeting decisions. Moreover, in such cases, a combatant will often be able to target a civilian on the basis of a right to self defence.

In the case of civilians habitually and continuously taking a direct part in hostilities, in reality functioning as combatants, it may seem counter-intuitive to grant such persons civilian protection in-between instances of their participation. Consequently, more elaborate cogitations pertaining to hostile intent as a requirement for determining instances of "hostilities" are plausible due to a less pressed temporal situation in such cases.

## **4 Direct participation**

### **4.1 Initial remarks**

As noted, the main rule regarding DPH, found in arts. 51 (3) AP I, 13 (3) AP II and CA 3

to the GCs, is that civilians are protected from attack, but suffer a suspension of this protection if they take a direct part in hostilities, for the duration of each specific act amounting to direct participation. The reasoning behind this focal part of humanitarian law is found in the divide between civilian and combatant, and the recognition that, whilst in need of special protection in times of armed conflicts, civilians taking part in hostilities merit no such protection.

The rule was first laid out in Common Article 3 to the Geneva Conventions of 1949, employing the term "persons taking no active part in the hostilities". It was conspicuously adopted in both Additional Protocols, with the phrasing "take a direct part". The semantic difference is of no interpretatory interest, and should be taken to denote the same concept. The French texts, moreover, employs the term *participent directement* in both instances.

While the DPH rule seems textually uncomplicated, neither the Geneva Conventions nor its Additional Protocols provides express definition of the term, and no clear guidelines as to its interpretation. The result has been a series of diverse interpretations who may be too wide or too narrow, either allowing arbitrary targeting of civilians or leading to civilian exploitation of their protected status. Both these alternatives are not satisfactory regarding preserving the underlying principle of distinction in practice. Clarifying what DPH is becomes vastly important in light of this. A clarification should comprise both plausible practical application in armed conflict, and be in line with the general purpose of IHL. Moreover, a clarification should "encompass(..) the modern spectrum of civilian activities" in light of the increased use of civilians performing work of a military nature.

#### 4.2 Systematic approaches to direct participation

For purposes of clarification, systemising approaches to what constitutes *direct* participation in hostilities into a restrictive and a liberal view seems rational, as it will help in illustrating the difference between direct and indirect participation in hostilities.

Melzer systemises the substantive scope of the notion of DPH in two main categories,

and Schmitt suggests a liberal approach as opposed to a more restrictive one, expressing the same categorization. There seems to be two main aspects of a liberal view on direct participation: a membership, or “functional combatancy” model, and a method based on an extensive textual interpretation of “direct”. These approaches, discussed below, are discernable interpretations often seen in analysis of DPH.

#### 4.2.1 Restrictive approach

A restrictive approach to determining direct participation seems based on restricting the concept of DPH to acts representing an actual and immediate military threat to a party to the conflict. The view is that a civilian has to engage in a specific attack for his behaviour to qualify as DPH, thus interlocking the act with the term “hostilities” in a strict textual interpretation.

The entire concept of such an restrictive approach rests on case-specific evaluations; it looks to individuals and their individual acts and determines whether these acts constitute DPH. If a civilian spontaneously and individually picks up his rifle at his home and goes out shooting at combatants, this would be one singular instance of DPH. Viewing DPH in such a strict textually bound manner leaves less room for complex evaluations than a more liberal textual interpretation would, since such situations would usually be tangible and easily recognized.

#### 4.2.2 Functional combatancy and membership models

The so-called membership approach springs out of the notion of functional combatancy, namely a civilian position that resembles that of a combatant to such a degree that his behaviour is seen as a continuous direct participation in hostilities. Although still civilians, according to the membership model the law should treat such individuals as combatants, and consequently they can be attacked legitimately continually and not merely at the instance of a specific act.

This involves looking to see whether the conduct in reality corresponds to that of State armed forces; this can incorporate planning, logistics, recruiting and so forth, the point

being that if a civilian *functions* as a combatant – or, rather, the activities of the group of which he is a member are of a military essence generally, he will suffer suspension of civilian protection as mere membership is deemed a continuous participation. This approach is widely used in practice in dealing with armed groups of various natures, and its birth is often seen as a result of such groups' increasingly significant role in modern armed conflict, be it international or non-international. The rationale behind it seems to be chiefly practical and it provides solution to the problem of how to deal with civilians in reality functioning as combatants. The arguments against such a functional approach seem twofold:

1. It effectively suspends civilian protection of a number of persons permanently. Since this arguably could constitute a violation of the principle of distinction, the threshold for deeming a civilian "functional combatant" should indeed be set very high. Setting such a threshold intrinsically implies a certain degree of tentativeness, and with it, a rather large margin of error. Mistakenly applying the term to and being able to legitimately target civilians poses clear problems, as it could lead to State killing of innocent civilians.
2. The second main problem with a functional combatancy approach is which functions in an organized armed group are to be covered. Indeed, there are members of State armed forces without combatant privilege, thus applying "functional combatancy" to all members of such armed groups may seem dubious. It is, however, clear that this interpretation is promulgated by some: "Our [the Israeli Defence Forces] view is that anyone involved with terrorism within Hamas is a valid target. This ranges from the strictly military institutions and includes the political institutions that provide the logistical funding and human resources for the terrorist arm". Pertaining to this statement, it was opined that "Once you extend the definition of combatant in the way the IDF [Israeli Defence Forces] is apparently doing, you begin to associate individuals who are only *indirectly* or peripherally involved [..]" [emphasis added]. Indeed, one should bear in mind that a militarylike armed group may consist of drivers, cooks, remote

financial supporters and other such elements never engaged in combat. One author argues that classifying different functions performed by members of such groups for the purposes of determining DPH is indeed rational, and members whose function does not approximate that of a combatant should not suffer permanent suspension of protection. This argument can seem convincing when seen in conjunction with non-combatant members of State armed forces having protected status. Still, and in line with Schmitt's views, there should be some substance to the argument that civilians' voluntary affiliation with such groups hardly merits the protections IHL affords non-participating civilians. Firstly, it can be questioned whether it is possible to have a *clear* non-combatant function in the context of membership in such groups. Secondly, one could argue that becoming a member in an organised armed group involves taking an active decision and one should not expect being protected as a civilian as a consequence. Regarded in conjunction with the inherent complication of providing useful intelligence as to groups members' positions within the group, the notion of group membership generally equalling functional combatancy, leading to permanent loss of civilian protection does seem of some merit if one accepts such an interpretation of the DPH rule as sound.

At the second ICRC meeting, it was also pointed out that introduction of a membership model would entail an extension of the DPH notion clearly not in line with what was originally intended at the Diplomatic Conference in 1974-1977, and that such an introduction probably would diminish civilian protection generally.

Furthermore, if such a category is to be introduced, the problem of qualification - regarding what the criteria for applying the model to a certain group should be - will become sensitive indeed, since it will effectively strip civilian protection from the persons it affects, the threshold for which arguably should be set very high.

#### 4.2.3 Extensive textual interpretation of *direct*

This point of view is based on extending the term "direct participation" to include, to

various degrees, activities that, while not of a directly military nature necessarily, contribute in some manner or other to the general war effort. Civilians could, for instance, be working in a munitions factory that is clearly a legitimate military target. From a restrictive point of view, such work does not constitute DPH – chiefly because there is no sufficiently causal link between the work and (possible) harm inflicted by it. However, one could argue that since such work *does* in fact contribute in a *direct* manner to the war *effort*, albeit not to the act of shooting itself, it could qualify as DPH. This is indeed a very radical thought, especially considering that such an approach would effectively legitimize targeting a very large number of civilians, breaking heavily with the main purpose behind and essence of IHL. Furthermore, one could argue that most work done by civilians in times of armed conflict in some way or another contributes to the general war effort, and drawing the line between what contributes to the war effort sufficiently to be deemed DPH and what contributes more indirectly and thus does not entail DPH is practically impossible. Such an extensive interpretation, moreover, has little support among authors, and is contrary to State practice as well.

#### 4.3 Emerging criteria for constituting DPH

Some criteria are constantly resurfacing in discussions of what amounts to direct participation in hostilities. One can organise them as three cumulative elements: a threshold of harm, a requirement of causality between the act and the harm, and so-called belligerent nexus.

##### 4.3.1 Threshold of harm

This criterion implies that the act in question must detrimentally affect the military operations or capacity of a party to the conflict, or is likely to do so. Plausibly, it may be deduced from the *direct* of the DPH rule; if an act does not have any inherent danger at all, it seems groundless to tag it as *direct* participation since combatants would not have any interest in addressing it, and it would not have any relevance regarding the reasons for implementing a DPH rule in IHL. The ICRC commentary on AP I states that: "[..] "direct" participation means acts of war which by their nature or purpose are likely to

cause actual harm to the personnel and equipment of the enemy armed forces”.

Spitting at an enemy armoured vehicle obviously does not have such damage potential and will not qualify, but launching an RPG towards it clearly will. Throwing a rock at such a vehicle is more of a dubious question. If it agitates or leads other civilians to start similar hostile acts thereby in reality increasing its damage potential, it could approximate the threshold of harm. Such an indirect application of the criterion is however dubious, chiefly on account of it being extremely impractical in real combat situations. But by the same argument, it could very well be rational to place it on the excessive side of the threshold of harm; if combatants find themselves bombarded by an incomprehensible melange of less sophisticated weapons and ordnance proper, they can hardly be expected to make elaborate calculations of who is legitimate targets among the assailants.

The Threshold of Harm-criterion is also exceeded if the act in question inflicts or is likely to inflict death or damage to civilians and civilian objects not under the control of the attacker. If acts of violence directed toward military forces has the potential of harming other civilians but not the military forces, the threshold of harm will be exceeded.

#### 4.3.2 Direct causation of harm

The second criterion states that there must be a direct causal link between the act in question and the harm likely to result (on either military objectives or civilian objects). The ICRC Commentary on AP I states that there should be a "*direct causal relationship* between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place" [emphasis added] The Commentary on AP II expresses the same notion: "[DPH] implies that there is a *sufficient causal relationship* between the act of participation and its immediate consequences" [emphasis added]. While the semantic difference between "direct causal relationship" and "sufficient causal relationship" is distinct, there is nothing that suggests this criterion being applied more restrictively in an IAC than in a NIAC, as the wording would seem to indicate. The

wording of the AP II Commentary seems preferable though, "sufficient" pertaining to adequacy rather than the unambiguity of "direct", the former more properly fitting to actual evaluations during armed conflict than the latter's theoretic prerequisites.

Melzer adheres to the criterion of direct causation, but amalgamates it with the threshold of harm; indeed, in instances of combat, it seems difficult to argue that viewing them as distinctly separate is practical or of any value in clarifying what DPH entails. The purpose of assessing DPH accurately is to ensure that civilian protection be upheld in armed conflict, and looking first to see if an act has damage potential, for then to consider whether or not this potential would be causally linked to a damage that may occur, could perhaps seem stilted in some situations.

#### 4.3.3 Belligerent Nexus

The concept of *belligerent nexus* has been a much discussed element of DPH analysis, without springing from treaty text directly. Its propagators see it as derived from the term "direct" in the DPH rule. It involves that for an act to qualify as DPH, it needs to have a nexus to a situation of hostilities; lack of such nexus will according to this criterion not result in suspension of protection. Preceptively, the act needs to be *designed* to support one party to the conflict by harming another. As such, harming a combatant with the purpose of mere robbery, for instance, would not qualify as direct participation in this context since there is no belligerent nexus to an instance of hostilities, even though the act is both obviously inflicting harm on military personnel and there is clear causation between the act and the harm inflicted.

A pointed critique of the requirement of belligerent nexus is that it involves establishing subjective intent on the part of the civilian, and defining and applying such hostile intent in actual armed combat can be fraught with difficulty. It is worth pointing out, though, that belligerent nexus and hostile intent are not synonymous; hostile intent is an intrinsic part and condition of belligerent nexus, but the intent needs to be directly linked to an instance of *hostilities* in order to constitute belligerent nexus.



The Respondents in *PCATI v. Israel* held that such intent could very well be employed as a criteria for constituting DPH, and this stance was also taken by several experts at the second ICRC meeting, even suggesting it as a theoretically superior way of determining DPH, albeit difficult and clearly inferior to an objective approach in actual combat operations. However, some experts held that coupling the intent criterion with the nexus of a specific act to armed conflict could provide a useful *indicator* of direct participation in such operations, and this does probably constitutes a practical value proper in situations other than retrospective analysis, arguably leading to the conclusion that belligerent nexus should only be construed as a potential guideline in determining DPH. If belligerent nexus is to be seen as a required criterion, it should probably suffice to see its existence as probable with the information available at the time, although even such application seems of dubious value considering its abstract nature and the fact that a determination of belligerent nexus may often be no more than conjecture on the part of the combatant. Belligerent nexus is perhaps better suited as a guideline than as a criterion in determining DPH.

#### 4.4 Clarifying direct participation facilitated by sub-division of civilians

Generally, whilst discussing civilians functioning as combatants, it should be underlined that one is looking to their *actions*, and whatever these may be, they are not deprived of the legal status of *civilian*. If one distinguishes between civilians affiliated with armed groups on the one hand, and civilians with no such connection on the other, a conclusion that some civilians may be treated as combatants in practice will be a consequence of their membership in such groups, and a function of the DPH analysis.

Sub-division of civilians hinges on functional combatancy and the membership models discussed above. If one approaches the problem of DPH with such a sub-division, the definition of "direct" will necessarily vary between the categories of civilians. On the one hand, there will be "functional combatants", that is, civilians whose conduct approximates that of a combatant to such a degree that suspension of protection from direct targeting will be permanent. On the other, there will be "civilians" in the traditional IHL sense of the term.

Whether pertaining to *membership* in a larger group of military essence, being a part of a smaller cabal of fighters or merely acting alone, functional combatancy with permanent loss of protection is plausible, although debated. One could argue in favour of a requirement of specific group membership for constituting permanent loss of protection, since the notion of the membership model is founded on a *group's* military essence and not solely the conduct of the individual civilian. But if such individual conduct outside the context of group membership amounts to continuous and unambiguous direct participation, it would seem unreasonable if deprivation of civilian protection could only be applied based on membership status, which will invariably include quite various degrees of participation, along with the problems of classification this entails.

Admittedly, since civilians participating on a continuous basis as often as not will be connected to, in various forms, armed groups of disparate proportions, the notion of the continually participating civilian acting alone is not the most practically applicable. However, it serves to underline that it should probably be individually continuous participation *in itself* that forms the basis for constituting permanent loss of protection, and not affiliation with a myriad of groups notoriously difficult to classify. This seems most in line with the wording and intention behind arts. 51 (3) AP I and 13 (3) AP II – “civilians” here should be taken to denote *individual civilians*.

The reasoning behind a sub-division of civilians is arguably facilitation of constituting DPH, and avoiding so-called “revolving door” problems, namely situations in which a civilian can opt in and out of hostilities, retaining his immunity whilst not engaged in actual combat operations.

#### 4.5 Resulting concept of direct vs. indirect participation

It seems clear that activities with no potential of inflicting harm can never constitute direct participation in hostilities. It would be too wide an interpretation of “direct” to include, for example, negligible acts intended merely as statements with no damage potential whatsoever. Were one to include such acts in the definition of “direct participation”, it would entail a danger to the civilian population going against the

intention of IHL.

Further, acts with no direct damage potential due to their remoteness are excluded, the harm potential of an act should be direct and immediate. Extending this principle would both create immense problems of quantification of harm potential and effectively include numerous civilian activities in times of armed conflict that, while indirectly supporting one party to the conflict by indirectly harming another, for example working in a munitions factory or producing war rations for combatants, are too distant from actual combat to qualify as DPH. Moreover, the number of civilians participating directly if one were to include such activities would be vast, also indicating that such an approach would be contrary to the paradigm of civilian protection inherent in IHL.

The notorious example of a civilian truck driver working in a situation of armed conflict can serve to illustrate these points. Driving Easter bunnies in time for holiday celebrations to the front lines in a situation of battle does not constitute DPH and he cannot be targeted directly. The act itself has no inherent damage potential. Driving ammunition, though, would arguably constitute DPH, since the directness of the act and the damage potential is causally linked. However, driving ammunition not to the front lines but to a munitions depot, would probably not. The reason is that the lack of causality between the act and the consequence; notwithstanding the fact that driving ammunition can qualify as an act with sufficient damage potential to qualify as DPH, if not driven to the actual scene of combat, the link between providing ammunition and thus inflicting harm seems too distant for constituting direct participation.

An interesting and indeed relevant issue is monetary funding of activities constituting DPH, prominently in the context of armed groups, and whether such funding *itself* fall within the scope of the DPH rule. Assuming it would, the "direct" wording in this rule indicates that such funding would have to involve it being *directly* related to instances of DPH. The threshold for such directness should then be the check.

Allocation of funds to a organised armed group in a general budget not particularly

pertaining to such groups, for instance government allocation of money, should not qualify because of its remoteness. On the other hand, an instance of direct funding of weapons purchased for the purpose of participating in hostilities arguably would. Activities performed to *acquire* such money is more dubious. If the aim of the activity is to fund and facilitate DPH directly, and solely designed for such a purpose, it may constitute DPH itself. It has been assessed that, for instance, some of Al-Qaida's funds originate from complex fundraising networks specifically designed for supporting this group. Organising such networks would be proximate to acts constituting DPH in such a way that it seems viable to argue it entails an instance of DPH in itself.

Technological advances have also brought forth instances of acts that could be said constituting DPH. For example, use of unmanned aerial vehicles (UAVs) can be considered here. If operated by civilians and used to engage targets, the operators would be directly involved in such a manner that proximity to the battlefield plausibly becomes irrelevant. It seems difficult to argue that such operation could in any way be indirectly linked to the instance of hostilities it pertains to. However, performing maintenance on UAVs employed in such a manner would probably not qualify as *direct*. The connection to the shooting is likely too remote; there is an insufficient causal link between the act and the harm. Installing its weapons systems is less clearly defined. The harm potential of the act is strictly speaking equivalent to that of operating the UAV, and no less critical for its purpose. Indeed, Schmitt has proposed a test for determining DPH consisting of assessing the criticality of the act to the direct application of violence against the enemy. He argues that an act is *direct* participation if the civilian can foresee that his action will harm or disadvantage the enemy in a relatively direct and immediate way, and exemplifies the line between direct and indirect participation here by stating that flightline aircraft maintenance personnel are participating directly, whereas depot-level workers are not. Harmonising with this view, then, installing weapons systems in UAVs would constitute direct participation, but general maintenance due to wear would not.

.

Additionally, there is the notion of "belligerent nexus". It dictates that an act must be

*designed* to harm one party to the conflict and consequently supporting another. One author includes this criterion quite distinctly in his definition of DPH. Arguably, this does not seem like a productive element in constituting DPH, leading more to lack of clarity than elucidation. From a practically oriented standpoint, determining subjective intent on the part of a civilian presumably engaged in DPH and setting such intent as a requirement for being able to target him or her directly appears less than realistic. It should be sufficient that the act *appears to be* designed for such purposes, an evaluation that should adhere to the standard of what a reasonable combatant normally would perceive the situation to be with the information available to him at the time.

## **5 Temporal scope of direct participation in hostilities**

Additional Protocol I dictates that the loss of protection occurring when civilians participate directly in hostilities is temporary in nature - the relevant wording is the "for such time" verbiage in arts. 51 (3) AP I and 13 (3) AP II - and thus merely a suspension, but it does not provide any guidelines as to the scope of this suspension. Indeed, it merely states that their protection is suspended "for such time" as they participate. A civilian can be, then, a valid military target exclusively in the interval between the start and end of his or her engagement in what amounts to direct participation, and determining the temporal scope of this participation is consequently vital. It is worth noting that the notion of one instance of DPH being temporally equal to the suspension of protection it induces is heavily supported by legal scholars

### **5.1 The problem of the "revolving door"**

The so-called "problem of the revolving door" refers to the fact that a civilian may, under IHL, participate in hostilities and clearly suffer suspension of protection during this participation, but subsequently regain civilian protection after his actions no longer constitute DPH; the possibility of opting in and out of hostilities continuously with all the protection afforded him under IHL is often seen as intuitively unjust. The problem is often

described as *farmer by day, guerrilla by night* and similar constructions.

Pertaining to civilians who are members of guerrilla fractions or armed groups of a military essence, the revolving door problem is often circumvented by regarding such persons as "functional combatants", their continuous participation forming grounds for loss of protection on a permanent basis and thus disqualifying them from benefiting from such a "door". Melzer opines such a restricted version of the "revolving door" and argues that, since only civilians who participate directly in hostilities on an unorganized and sporadic basis will be able to benefit from a revolving door of protection, a tolerance of a revolving door problem is an acceptable price to pay, since a more liberal approach – referring to extending the notion of "for such time" beyond the plausible temporal demarcations of DPH – would entail significant danger for the general civilian population. One author seems to disagree with both Melzer's view and the general view of the ICRC meetings, arguing that a revolving door of protection is not acceptable even with regard to civilians who only participate sporadically and are not members of an armed group. Where Melzer holds that only DPH of a continuous nature based on a membership model would be exempt from revolving door protection, Schmitt suggests that recurring, or, indeed, merely a single act of, direct participation could be sufficient for emaciating the notion of a revolving door. The rationale is that this should clarify DPH for combatants, and graft incentive to stay out of armed conflict on to the civilian population: "If civilians could repeatedly opt in and out of hostilities, combatants victimized by their activities would quickly loose respect for the law, thereby exposing the civilian population as a whole to greater danger. Moreover, the greater their susceptibility to attack, the greater their incentive to stay out of the conflict. [...] Once an individual has opted into hostilities, he or she remains a valid military objective until unambiguously opting out". Such opting out can take the form of "extended non-participation or an affirmative act of withdrawal". It is hard to read this as anything else than a requirement that a civilian who have participated in hostilities, albeit only in one instance, suffer suspension of protection in temporal proximity to the act extending beyond that of actual participation. At the third ICRC meeting, it was pointed out that the duration of an instance of DPH was equal to the duration of the ensuing loss of protection, so the "until-opting-out"

approach above would, the Meeting opinion considered, necessarily entail extending an instance of DPH far beyond a singular act of DPH to accommodate such a protracted temporal scope.

How extended the civilian's non-participation should be for protection to be reinstigated would in this case be an acutely arduous appraisal, perhaps not making such a requirement well suited for clarification purposes.

## 5.2 Varying approaches to the temporal scope of DPH

The treatment of the temporal scope of DPH was one of the main debated issues at the 2005 ICRC expert meeting, and underlined as "[..]one of the most important issues to be clarified[..]". The deliberations were based on two main premises; 1: that the duration of one instance of DPH is equal to the ensuing suspension, and that 2: the revolving door as a legal mechanism is inevitable. There were three main approaches to the temporal problem; together they serve the purpose of pointing out the main problems of the temporal scope of DPH quite well.

### 5.2.1 Specific acts

The "specific acts approach" is based on the idea that the duration of one instance of DPH is equal to the duration of the suspension of protection it triggers. Thus it demonstrably is the result of a strict textual interpretation of the "for such time" verbiage. The main advantage to such an approach lies in its simplicity; civilians can only be attacked when they participate directly in hostilities, not after or before such participation. Even considering the debate of *what* should constitute DPH, one can hardly set a more tangible guideline.

The main problem with this approach is clearly the existence of recurrently participating civilians, ranging from participation in a few instances, via habitual participation, to

downright functional combatancy – carried out by both individuals acting more or less alone, or members of armed groups and militias. In all these cases, the revolving door problem will be manifest if the temporal nature of DPH is solely to be based on a specific acts approach, and it does indeed seem difficult to argue that a civilian engaged in combat operations on a regular basis does not pose a military threat because he is home in bed. Consequently, if one does not accept a "revolving door" for such participants, this approach is left regulating only a small number of instances of DPH, "[..] less than one percent of the targeting decisions taken during an armed conflict [..]", since the majority of such decisions apply to functional combatants, or, at least, civilians participating in hostilities on a regular basis. Moreover, the marginal application a specific acts approach would probably pertain to cases where the use of lethal force could be justified by the right to self-defence, rendering the whole concept of such an approach nugatory but for theoretical purposes.

One expert at the Meeting suggested that the deficiencies of the "specific acts approach" be addressed by combining the approach with an extensive interpretation of "hostilities". Its strength would be augmented if one extended the notion of "hostilities" to include direct planning, logistical support, deployment to and return from the scene of action, and similar elements. The impediment to this view is ostensibly that the practical value of such an approach is deprecated by adding prerequisite evaluations regarding "hostilities" in each individual case prior to a decision of targeting.

### 5.2.2 Affirmative disengagement

The "affirmative disengagement" approach entails that suspension of protection from attack as a result of DPH will last until there is a declaration of some sort announcing the civilian's withdrawal from the hostilities. The disengagement should be objectively recognisable to the adversary, but can consist of both an affirmative *act* or verbal declaration, or extended non-participation. In the case of membership in an armed group, a declaration of withdrawal and indeed extended non-participation seems plausibly applicable criteria for practical purposes; however, this is more contentious in



the case of individual civilians participating on a sporadic and non-organised basis. Questions have been raised regarding how practical it is in the context of "[..]the de-personalized reality of modern warfare[..]" to convey individual declarations of disengagement, and such questions are indeed of some weight; the feasibility of keeping track of each civilian who have participated directly in hostilities' *status of participation* seems of an incalculable nature, although the stipulation of an affirmative act of withdrawal does provide "jamming of the revolving door", as Schmitt puts it.

Although today's armed conflicts may involve civilian participation in such large numbers that one can argue them "de-personalised", the existence of individuals prominently visible by virtue of intelligence operations or, indeed, their own acts, is undeniably worth considering as well. Such individuals may very well be easily able to declare affirmative disengagement. Consequently, whilst technological advances and prominent civilian presence arguably could amount to "de-personalisation" of armed conflict, by the same token modern combat could be said to have a distinct "personalised" aspect as well. A view that affirmative disengagement is too difficult to declare in today's armed conflicts for this to be a reasonable approach in determining the temporal scope of DPH should probably not be based on an argument of "de-personalisation". Many civilians could have better possibilities of declaring disengagement by virtue of technological advances; modern intelligence efficiency and evolving communication channels such as the Internet will hardly be a hindrance in this respect.

### 5.2.3 Membership model

The so-called "membership model" is a combination of a specific acts approach and an affirmative disengagement approach, and seems developed mainly for addressing the shortcomings of these. The idea is, that whilst a specific acts approach is rational when it comes to regulating the temporal aspect of DPH pertaining to civilians participating on a sporadic basis, for continuously participating persons it is not. Conversely, the affirmative acts approach does not seem particularly well suited to the former because of the inherent difficulties such an individual will face in order to provide a declaration of

disengagement, whereas it does ostensibly hold more merit applied to the latter, partly because such participation, one could argue, is of a nature not deserving the protection of the law, but also because members of armed groups will arguably be in a position to more easily provide a disengagement declaration.

Hence, in order to tailor the solution to DPH's temporal problem to different civilian participation levels, the membership model combines the two former models: the specific acts approach regarding civilians participating spontaneously and singularly, and the affirmative disengagement model pertaining to members of armed groups. This model is also the one Israel's Supreme Court asserts in *PCATI v. Israel*, although the Court does imply that some degree of detachment from a previous instance of participation should be required even for a civilian participating sporadically. This is a subtle distinction from the membership model of the ICRC Meeting and Melzer, but vital none the less. The Court opines that "a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity [...] is entitled to protection from attack". This does not seem as an assertion of an affirmative disengagement model directly, since it is very unclear what the word "detaches" would denote here; while it could entail an expanse of suspension of protection beyond the duration of a specific act, the wording is devoid of a requirement that a detachment be objectively recognisable for the adversary.

### 5.3 Clarifying "for such time"

It should seem clear, then, that neither a specific acts approach nor an affirmative disengagement model are suited for clarifying the temporal aspect of DPH. Because of the different levels of civilian participation, ranging from one-time spontaneous actions to planned and coordinated attacks performed by members of armed groups of a military essence, it is difficult asserting *one* definitive guideline that would embrace all instances efficiently and for the proper implementation of IHL values.

If one presumes that the best possible protection of the general civilian population

coupled with the possibility for military forces to conduct their operations effectively is the goal, it appears difficult to ignore an approach based on treating different categories of civilians separately.

This, then, entails distinguishing between two main groups of civilians, namely persons functioning as combatants and the rest. The former would be seen as functional combatants and thus a legitimate military target permanently (or until they have disengaged). The latter is afforded civilian protection and can only be attacked whilst participating directly in hostilities.

Regarding the legal implementation of a such a distinction, it worth pointing out that it should be based on an interpretation of the DPH rule, encompassing group membership in itself, thus founding group members' permanent suspension of protection on treaty wording instead of merely extending the notion of combatancy to include such members.

Temporally, both alternatives would lead to the same result, both propitiating a military need to address the revolving door problem. However, the former method, deducing the notion of continuous participation from the "for such time" of the treaty wording, does perhaps stand as better legal reasoning in that it does not necessitate a more or less dubious extension of the combatancy term.

With permanent suspension of protection applying to members of armed groups or "functional combatants", the question of how one should treat spontaneous and un-organised DPH temporally remains. The answer is conceivably that one should rely on a strict textual interpretation of "for such time". Extending it may entail danger to the general civilian population by leading to confusion as to who may be attacked legitimately in armed conflict. The consequence of a strict interpretation will necessarily be that one has to accept certain instances of a revolving door of protection, since sporadic and unorganised DPH will entail suspension of protection for the duration of one instance of participation.

Dividing the temporal scope of DPH in two classes does bring about certain complications. For the "membership class", the problem lies in the questionable legality of continuously being able to target individuals that are in fact civilians by legal status. For the "spontaneous DPH class" the main caveat is that one has to accept a small revolving door of protection. However, both have – owing to their relative simplicity – the advantage of being practically plausible in a situation of armed conflict. Consequently, guidelines on the temporal aspect of DPH should arguably pertain to how this aspect should be treated under the wings of a two-class division.

## **6 Precautions in cases of doubt**

For the combatant faced with civilians involved to various extents in hostilities, there will necessarily often be an element of doubt *re* whether such involvement constitutes direct participation and the civilian can be legitimately targeted. How such doubt should be treated from a legal-theoretical standpoint will admittedly not be of the greatest import directly in a situation where reliance on instinct is perhaps of more immediate value, but in providing guidelines for the combatant and facilitate military planning a theoretical approach to the problem is fundamental. Clear rules of engagement is of important in facilitating adherence to IHL in armed conflict, and clarification of how combatants should relate to situations of doubt

For practical purposes, the main views of how direct participation should be construed in cases of doubt can be classified as restrictive and liberal pertaining to interpretation of "direct". It is worth noting that doubt as to civilian or combatant *status* should not be confused with doubt regarding *direct participation*. The former is explicitly regulated in treaty law, stating plainly that a person be considered a civilian in case of doubt regarding his or her status, while the latter is not.

## 6.1 Restrictive view

The view that "determination [of DPH] must be made in good faith and in view of all information available in the concrete situation" seems self-evident considering the general principle of precaution in IHL. Extending on this, it can be argued that, in case of reasonable doubt as to whether a civilian constitutes a legitimate military target, the general principle of precaution must come to the benefit of the civilian. Melzer argues in favour of such a view and adds that: "As a matter of logical juridical reasoning, for each category, the general rule established by the law must apply until the requirements for an exception are fulfilled". Bearing in mind that *doubt* regarding the DPH question pertains to *how these requirements for an exception should be interpreted*, this does not seem particularly enlightening. The same author also combines the concepts of "reasonable" and "persisting" doubt; in this regard it seems worthwhile to point out that while *reasonable* doubt, admittedly, should probably lead to presumption of protection against direct attack, which was the general view emanating from the third ICRC expert meeting, *persisting* doubt would necessarily entail continuous civilian acts of a doubt-incurring nature arguably pointing in the direction of finding direct participation.

The restrictive view on the issue of doubt, then, seems to set a standard of "reasonable doubt"; a combatant should do everything feasible to determine whether or not he is attacking a legitimate target. The question should be answered by determining on which side of neutral the civilian appears to be with the intelligence available at the time.

## 6.2 Liberal view

The liberal view is also based on one of the underlying purposes of IHL, namely the protection of the civilian population, but applies different means to this end in the context of doubt. One author argues that grey areas should indeed be interpreted liberally and in favour of finding direct participation, and states that: "Although it might seem counter-intuitive to broadly interpret the activities that subject civilians to attack, in fact, doing so is likely to enhance the protection of the civilian population as a whole", without elaborating further. The logic does seem to be that a "hard-line" towards civilian

participation in hostilities will scare other persons from engaging in hostilities: "[..] a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible". While logically sound, it seems questionable if such an incentive will indeed be sufficient for discouraging civilian participation, and – importantly – strengthening *general* civilian protection by removing a *specific* protection seems of somewhat dubious merit.

The second main argument for such an approach to the question of doubt lies in the balance between military necessity and humanitarian considerations. Although protection of the civilian population is of fundamental to IHL, the law also recognizes a military need to conduct operations efficiently, and seeks to propitiate this need. If a liberal interpretation provides clearer guidelines for combatants, it is of value *re* military necessity and can thus be weighed against humanitarian considerations favourably for finding direct participation in cases of doubt. However, assessing that it provides combatants with clearer guidelines if they are able to establish direct participation by interpreting the rule liberally seems conceited. Arbitrary targeting of civilians can hardly be stated militarily necessary.

### 6.3 Resulting treatment of doubt in determining direct participation in hostilities

It seems unclear whether a liberal approach to the problem of doubt entails assessing that reasonable doubt should equal direct participation or it merely comprises the view that the term *reasonable doubt* itself should be interpreted liberally. In the latter case, it hardly provides clarification of the issue and thus does not seem to carry any substantial weight. In the case of the former, its proximity to arbitrariness seems ominous.

Targeting decisions in cases of doubt of direct participation should be based on a reasonable evaluation considering the information available at the time and the perceptions of a reasonable combatant. Providing further guidelines of interpretation for the term "reasonable doubt" in this context would probably only jumble the evaluation.

## 7 Conclusions

Providing a definitive definition of the term "direct participation in hostilities" seems difficult, or, indeed, impossible. The complexities of the issue are such that legal opinion are diverse and differing, and they will probably remain that way. However, guidelines pertaining to how DPH should be construed in a situation of armed conflict are essential and cannot be neglected on the grounds that a conclusive definition of DPH is nonviable.

Treaty wording not providing an express definition of DPH, clarifying the content of the DPH rule is instrumental to providing such guidelines. A clarification that does not incorporate the most disputed elements is probably sound; introducing interpretations and views that cannot be reasonably deduced legally from treaty wording may not shed light on the issue at all.

The notion of "hostilities" in the DPH rule is not equivalent to "armed conflict", although any act considered as direct participation in hostilities must be conducted in the context of armed conflict. *Hostilities* is a term linked to *acts*, whereas *armed conflict* is first and foremost a state. For DPH purposes, hostilities could be defined as *acts of violence apparently directed against a party to the conflict*. Whilst not being a concluding definition, restricting the notion of hostilities further may exclude acts that arguably should fall within the scope of DPH. It is also important to underline that "conflict" here should not include disputes and riots not qualifying as armed conflict.

An act of participation in hostilities has to be *direct*. Any interpretation of *direct* should be based on treaty law, and the farther one positions an interpretation from a conventional legal definition of the term, the more disputable the explication will become. It seems clear that for an act to fall within the scope of *direct*, it should have an inherent harm potential. Furthermore, there should be a direct causal between the act and the damage. Additionally, while the act should pertain to an instance of hostilities to qualify as direct, explicit intention on part of the civilian in this respect should probably not be required.

Treaty wording merely dictating that suspension of protection from attack shall only last "for such time" as the civilian is participating directly in hostilities, the temporal aspect of DPH is not clarified by the treaties themselves. Regarding the underlying principles of IHL, it may seem contrary to the law if one extends the duration of suspension of protection beyond that of an instance of participation. However, if a civilian is continuously participating in hostilities, treating such behaviour as one continuous instance of participation does not seem contrary to IHL when one acknowledges that such a level of participation seems functionally identical to that of a combatant. This should not, however, mean that *any* act of participation will lead to permanent suspension of protection; civilians whose participation is not essentially similar to that of a combatant should regain protection after an instance of participation. Applying this method does entail treating civilians differently under treaty law, and one should consequently exercise restraint in branding a civilian "functional combatant".

With a view to the great wars of the 20th century, it seems that "Jerry" or "the Boches" have disappeared from today's armed conflict, and have in many cases been replaced by the incompetent resistance of the civilian. However, the law of armed conflict remains, and its core values and principles are becoming no less relevant as time passes.



## References

### Literature:

**Fleck, Dieter (ed.):** *The Handbook of International Humanitarian Law*, Second Edition, Oxford University Press, Oxford 2008

**Guillory, Michael E.:** "Civilianizing the force: is the United States crossing the Rubicon? - role of civilians under the laws of armed conflict", *Air Force Law Review*, Spring 2001 [online April 20 2009], URL:  
[http://findarticles.com/p/articles/mi\\_m6007/is\\_2001\\_Spring/ai\\_92044661/](http://findarticles.com/p/articles/mi_m6007/is_2001_Spring/ai_92044661/)

**Henckaerts, Jean-Marie & Doswald Beck, Louise (eds.),** (Excerpt), *Customary International Humanitarian Law, Volume II, Practice*, Cambridge University Press, 2005 (Excerpt available from Cambridge University Press [online April 21 2009]. URL:  
[http://assets.cambridge.org/97805218/39372/excerpt/9780521839372\\_excerpt.pdf](http://assets.cambridge.org/97805218/39372/excerpt/9780521839372_excerpt.pdf)

**Khen, Hilly Moodrick-Even:** "Following HCJ 769/02 The Public Committee Against Torture in Israel v. the Government of Israel. Can We Now Tell What "Direct Participation in Hostilities" is?", *Israel Law Review*, Vol. 40, No. 1, pp. 213-244 (2007), (Jura Gentium [online April 20 2009]), URL:  
<http://www.juragentium.unifi.it/en/surveys/wlgo/cortona/moodrick.htm>

**Lyall, Rewi:** "Voluntary Human Shields, Direct Participation In Hostilities and The International Humanitarian Law Obligation of States", *Melbourne Journal of International Law*, Vol. 9, No. 2, October 2008 (Melbourne Journal of International Law [online April 20 2009]), URL: [http://www.mjil.law.unimelb.edu.au/issues/archive/2008\(2\)/01Lyall.pdf](http://www.mjil.law.unimelb.edu.au/issues/archive/2008(2)/01Lyall.pdf)

**McDonald, Avril:** "The Challenges To International Humanitarian Law and The Principles of Distinction and Protection From The Increased Participation of Civilians In Hostilities", Background Paper, (WIHL [online April 20 2009]), URL: [http://www.wihl.nl/categorieen/intro.asp?sub\\_categorie=32](http://www.wihl.nl/categorieen/intro.asp?sub_categorie=32)

**Melzer, Nils:** *Targeted Killing in International Law*, Oxford University Press, Oxford 2008

**Program on Humanitarian Policy and Conflict Research, Harvard University:** "IHL and Civilian Participation in Hostilities in the OPT", Policy Brief, October 2007, (HPCR [online April 20 2009]), URL: <http://www.hpcrresearch.org/pdfs/ParticipationBrief.pdf>

**Quéguiner, Jean-François:** "Direct Participation under International Humanitarian Law", Working Paper, IHL Research Initiative: Reaffirmation and Development of IHL, Harvard Program on Humanitarian Policy and Conflict Research, November 2003, (ihlresearch [online April 20 2009]), URL: <http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf>

**Sassòli, Marco:** "Transnational Armed Groups and International Humanitarian Law", HPCR Occasional Paper Series, Winter 2006 Number 6 (HPCR [online April 18, 2009]) URL: <http://www.hpcr.org/pdfs/OccasionalPaper6.pdf>

**Schmitt, Michael N.:** "Direct Participation in Hostilities" and 21st Century Armed Conflict", [online April 20 2009], URL: <http://www.michaelschmitt.org/images/Directparticipationpageproofs.pdf>

**Schmitt, Michael N.:** "Ethics and Military Force: The Jus in Bello" (Edited transcript of speech delivered at the Carnegie Council Workshop on European and North American Perspectives on Ethics and the Use of Force, Cambridge, England, January 7. 2002), (CCEIA [online April 20 2009]),

URL: <http://www.cceia.org/resources/transcripts/98.html>

**Schmitt, Michael N.:** "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", [online April 20 2009],

URL: <http://www.michaelschmitt.org/images/Schmitfinal.pdf>

**The ICRC,** "Conduct of hostilities and international humanitarian law", (ICRC [online April 21, 2009]), URL:

[http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian\\_law:Conduct\\_of\\_hostilities?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:Conduct_of_hostilities?OpenDocument)

**The ICRC,** Commentaries to 1949 Conventions and their 1977 Additional Protocols, (ICRC [online April 21, 2009]),

URL: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>

#### Judgements/Decisions:

**International Criminal Tribunal for the former Yugoslavia,** *Prosecutor v Dusko Tadic*, Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, (UN [online April 12, 2009]).

URL: <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>

**Supreme Court of Israel**, Judgement, HCJ 769/02, December 11, 2005 (Supreme Court of Israel [online 18. April 2009]),

URL: [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf)

Meeting summaries:

**Chatham House:** "Civilians at War: Deconstructing the 21st Century Battlefield", Chatham House International Law Discussion Group, (Summary of meeting held November 1. 2007, (Chatham House [online April 20 2009]),

URL: [http://www.chathamhouse.org.uk/files/10161\\_il011107.pdf](http://www.chathamhouse.org.uk/files/10161_il011107.pdf)

**Copenhagen Conference** on "The Handling of Detainees in International Military Operations. Non-Paper on legal framework and aspects of detention" 11 - 12 October 2007, Denmark, [online April 21 2009],

URL:

<http://www.ambottawa.um.dk/NR/rdonlyres/F5364962-DC30-4333-9EFC-1B612B43DC28/0/NonpaperCopenhagenConference.pdf>

**The ICRC and the TMC Asser Institute:** "Second Expert Meeting Direct Participation in Hostilities under International Humanitarian Law". Summary Report, The Hague, 2004 (ICRC [online April 20 2009]),

URL:

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2004\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf)

**The International Committee of the Red Cross:** "Direct Participation in Hostilities under International Humanitarian Law", Summary Report, Geneva, 2003, (ICRC [online April 20 2009]),

URL:

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf)

**The International Committee of the Red Cross and the TMC Asser Institute:** "Third Expert Meeting on the Notion of Direct Participation in Hostilities", Summary Report, Geneva, 2004, (ICRC [online April 20 2009]),

URL:

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct participation in hostilities 2005 eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-2005-eng.pdf)

Other sources:

**Global Security** (Web page), "Funding in Afghanistan", (Global Security [online April 21, 2009]), URL: <http://www.globalsecurity.org/military/world/para/al-qaida-funding.htm>

**Sharp, Heather:** "Gaza conflict: Who is a civilian?" (BBC News article), (BBC [online April 20 2009]), URL: [http://news.bbc.co.uk/2/hi/middle\\_east/7811386.stm](http://news.bbc.co.uk/2/hi/middle_east/7811386.stm)